

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID JOHN TYRRELL, CHANTEL SPRING BUHROW,
DAVID ROLAND OTTS, DUANE GERARD KRZYSIK,
EARL DAVID BROCK, JAMES LOUIS CAHALL,
and SAMUEL QCHENG LIN

Appeal 2007-0042
Application 09/746,880
Technology Center 3700

Decided: April 23, 2007

Before CHUNG K. PAK, TERRY J. OWENS, and THOMAS A. WALTZ,
Administrative Patent Judges.

WALTZ, *Administrative Patent Judge.*

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's final rejection of claims 1-5, 8-15, 20-29, 32-35, 40, 41, 43, 45-47, and 49-56. Claims 6, 7, 16-19, 30, 31, 36-39, 42, 44, and 48

stand withdrawn from consideration as directed to a non-elected invention (Br. 1; Final Office Action dated Sep. 25, 2002, page 1). We have jurisdiction pursuant to 35 U.S.C. § 6.

According to Appellants, the invention is directed to an absorbent article including an outer cover, a liquid permeable bodyside liner that defines a bodyfacing surface and is connected in superposed relation to the outer cover, and an absorbent body located between the bodyside liner and the outer cover (Br. 2). The bodyfacing surface of the liner contains a lotion composition which includes an emollient, a viscosity enhancer, and a decoupling polymer (*id.*).

Appellants state that the “rejected claims do not stand or fall together” (Br. 6). However, Appellants provide no specific, substantive reasons for the separate patentability of the Group II claims (“for the same reasons as those stated above”) (Br. 9). Therefore, we select claim 1 from the Group I claims and limit our consideration to this claim as representative of all the claims in the sole ground of rejection. *See* 37 C.F.R. § 1.192(c)(7)(8)(2003), in effect as of the filing date of the Brief; *and In re McDaniel*, 293 F.3d 1379, 1383, 63 USPQ2d 1462, 1465 (Fed. Cir. 2002). Representative independent claim 1 is reproduced below:

1. An absorbent article comprising:

- (a) an outer cover;
- (b) a liquid permeable bodyside liner that defines a bodyfacing surface and that is connected in superposed relation to the outer cover;
- (c) an absorbent body that is located between the bodyside liner and the outer cover; and

(d) a composition on at least a portion of the bodyfacing surfaces of the bodyside liner that includes from about 40 to about 95 percent by weight of emollient, from about 0.1 to about 40 percent by weight of viscosity enhancer and from about 0.1 to about 20 percent by weight of decoupling polymer.

The Examiner has relied upon the following references as evidence of obviousness:

Krzysik	6,149,934	Nov. 21, 2000
Beerse	6,294,186 B1	Sep. 25, 2001

ISSUES ON APPEAL

The claims on appeal stand rejected under 35 U.S.C. § 103(a) as unpatentable over Krzysik in view of Beerse (Answer 3).

Appellants contend that the Examiner has not explained why one of ordinary skill in the art would look at the components of the water based solutions of Beerse and be motivated to use them in the nonaqueous compositions of Krzysik (Br. 8).

Appellants also contend that the Examiner has “picked and choosed” from the many product forms and possible components of Beerse, and has not explained why one of skill in the art would have been motivated to select the thickening agents of Beerse to be used in the lotion compositions of Krzysik, especially in view of the large number of groups of compounds disclosed in Beerse (Br. 8 and 10).

The Examiner contends that Krzysik recognizes the addition of many optional components, and Beerse teaches the use of a thickening agent, such as a polysaccharide, for its attendant benefits in a skin care composition (Answer 5-6).

Accordingly, the issues in this appeal are as follows: (1) does Beerse teach the use of polysaccharides and polyacrylamides as thickeners in skin care compositions?; and (2) would it have been within the ordinary skill in this art to use the thickener of Beerse in the skin care composition of Krzysik with a reasonable expectation of successful results?

We determine that the Examiner has established a prima facie case of obviousness in view of the reference evidence, which prima facie case has not been adequately rebutted by Appellants' arguments.¹ Therefore, we AFFIRM the sole ground of rejection in this appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.

OPINION

We determine the following factual findings from the record in this appeal:

- (1) Krzysik discloses an absorbent article comprising a topsheet, backsheet, an absorbent core located between the topsheet and backsheet, and the topsheet has a lotion formulation applied to it, where the lotion formulation comprises an emollient, a wax, and a viscosity enhancer (Abstract; col. 2, ll. 10-30; col. 3, ll. 12-23; col. 9, ll. 31-41; and the Answer 3-4);
- (2) Krzysik discloses that the lotion composition has a reduced level of migration, reduces the abrasion to the wearer's skin, and

¹ We have also considered the Decision in related Appeal No. 2005-1186 (S.N. 09/746,872), as well as related Appeal No. 2007-0326 (S.N. 09/746,888), and related U.S. Patent No. 6,287,581 B1 (S.N. 09/379,928; see the Specification 2:14-21).

provides improved skin health (Abstract; col. 1, ll. 48-53; and col. 2, ll. 23-25);

- (3) Krzysik teaches that the emollient acts as a lubricant to reduce the abrasiveness of the bodyside liner to the skin, the wax functions as an immobilizing agent for the emollient and any active ingredient to reduce the tendency to migrate, and the viscosity enhancer increases the viscosity to help stabilize the formulation on the bodyfacing surface of the liner to reduce migration and improve transfer to the wearer's skin (col. 9, ll. 42-45; col. 10, ll. 8-13; and col. 10, ll. 48-51);
- (4) Krzysik teaches that many other conventional additives may be used in the lotion formulation, including antimicrobial actives (col. 11, ll. 24-60; and the Answer 5);
- (5) Beerse teaches antimicrobial compositions that may be applied to an absorbent article carrier in a lotion or ointment, which lotion or ointment may contain the antimicrobial actives, an emollient, and a thickening agent (col. 9, ll. 4-17; col. 18, ll. 42-61; and col. 19, ll. 4-15; Answer 4);
- (6) Beerse teaches various well known thickening agents in the lotion art, including polysaccharides and polyacrylamides (col. 36, l. 54-col. 38, l. 31; Answer 4); and
- (7) Beerse exemplifies water-free lotion compositions (col. 57, ll. 12-23).

Where the claimed subject matter has been rejected as obvious in view of a combination of prior art references, a proper analysis under § 103

requires consideration of at least two factors: (1) whether the prior art would have suggested to those of ordinary skill in the art that they should make the claimed composition or article, and (2) whether the prior art would also have revealed that in so making, those of ordinary skill would also have a reasonable expectation of success. *See In re Vaeck*, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). Teachings in the prior art references must be considered for what they would have suggested to one of ordinary skill in the art, even though the teaching of the prior art is broad. *See Merck & Co. v. Biocraft labs, Inc.*, 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir. 1989); *In re Susi*, 440 F.2d 442, 446, 169 USPQ 423, 426 (CCPA 1971). An express suggestion to substitute one equivalent for another need not be present to render such substitution obvious. *See In re Fout*, 675 F.2d 297, 301, 213 USPQ 532, 536 (CCPA 1982).

Applying the preceding legal principles to the factual findings in the record of this appeal, we determine that the Examiner has established a prima facie case of obviousness in view of the reference evidence, which prima facie case has not been adequately rebutted by Appellants' arguments. As shown by factual finding (1) listed above, we determine that Krzysik discloses every limitation of claim 1 on appeal with the exception of the "decoupling polymer" component of the lotion composition (which may be polysaccharides or polyacrylamides; *see* claim 5 on appeal; Answer 4). As shown by factual findings (2), (3), and (4) listed above, we determine that Krzysik teaches many other conventional or well known additives may be incorporated into the lotion composition, as well as teaching the function of each of the primary components. As shown by factual findings (5) and (6)

listed above, we determine that Beerse teaches similar lotion compositions to those of Krzysik, applied to the same or similar absorbent articles, while teaching the use of conventional thickeners such as polysaccharides or polyacrylamides to “thicken” the lotion or ointment composition.

Accordingly, we determine that the “thickeners” taught by Beerse would have been recognized by one of ordinary skill in this art as equivalent in function to the “viscosity enhancers” taught by Krzysik, as well as equivalent to the wax immobilizing agent of Krzysik since a thickener would also reduce the tendency of the lotion to migrate. We also determine that the addition of these thickeners taught by Beerse to the composition of Krzysik for their intended function would have been obvious, with a reasonable expectation that these thickeners would be successful for their intended purpose.

Contrary to Appellants’ argument that Beerse teaches the use of thickeners only to form gels from water or alcohol based solutions, we determine that Beerse discloses and suggests numerous types of lotions and ointments where thickeners may be employed, including non-aqueous lotions (col. 8, ll. 28-35; col. 19, ll. 4-15; *see* factual finding (7) listed above).

Appellants also present arguments directed to the motivation to select the particular thickeners of Beerse from the “large number of groups of compounds” disclosed in this reference (Br. 8 and 10). However, as found from factual findings (4), (5), and (6) listed above, Beerse teaches various compounds such as polysaccharides and polyacrylamides were well known

in the art as thickeners, with their attendant benefits.² Appellants have not alleged or shown any criticality for selecting the claimed thickeners or “decoupling polymers” from the list of conventional thickener additives taught by Beerse.

For the foregoing reasons and those stated in the Answer, we affirm the rejection of claim 1, and claims 2-5, 8-15, 20-29, 32-35, 40, 41, 43, 45-47, and 49-56 which stand or fall with claim 1, under § 103(a) over Krzysik in view of Beerse.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

sld/ljs

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² See the Decision in Appeal No. 2005-1186, page 6, first paragraph.